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SOME OBSERVATIONS CONCERNING A MODEL CODE OF EVIDENCE

EDMUND M. MORGAN †

An investigation of a past event or condition, rationally conducted, normally requires the production and consideration of all relevant material from all available sources. The Anglo-American law of Evidence consists largely of limitations upon this normal process. Some of these limitations are due to the objectives of judicial investigation and the constitution of the investigating tribunal; some, to judicial and legislative judgments concerning the comparative values of competing social policies; and some, to historical accident. As they have been applied in cases with myriad variations of facts, they have become encrusted with qualifications and have developed complexities and inconsistencies, which are the despair of thoughtful members of the bench and bar. An intelligent attempt to meet the need for clarification and simplification requires an examination of the existing restrictions, to ascertain to what extent they are justified, and what sort of remedy is practicable.

INCOMPETENCIES OF WITNESSES

At common law at different times, and subject to various exceptions, a person was subject to be disqualified as a witness by reason of alienage, race, infancy, mental derangement, interest, marital relationship, or conviction of crime. These disqualifications in their most obnoxious aspects have long since been abolished in the great majority of jurisdictions. There are, however, a few states in which a husband or wife is incompetent for or against the other, and a few in which a conviction of perjury makes the convict incompetent to testify. In

† A. B., 1902, A. M., 1903, LL. B., 1905, Harvard University; A. M., 1919, Yale University; Professor of Law at Harvard University; co-editor, *CASES ON COMMON LAW PLEADING* (1917); author, *INTRODUCTION TO STUDY OF LAW* (1924); co-editor, *CASES ON EVIDENCE* (1934); and of numerous articles on the law of Evidence in legal periodicals.

many also there remains a vestige of the disqualification on account of interest. The first two survivals may be regarded as local idiosyncrasies destined soon to extinction. The last requires more serious consideration.

In most states when legislation made parties and other interested persons generally competent as witnesses, it placed limitations upon their power to testify in actions against the representatives of a decedent or incompetent. In some the interested witness may not testify to any claim originating in the lifetime of the decedent or during the competency of the incompetent; in others as to any transaction occurring before the death or the origin of the incompetency; in still others as to any matter to which the decedent or incompetent might have been able to testify were he alive and competent; in most the prohibition covers any transaction or conversation with the decedent or incompetent. The courts in applying and attempting to justify these statutes have indulged in some pleasing and plausible phrases: "This right and privilege (to testify) must be mutual. . . . If death has closed the lips of the one party, the policy of the law is to close the lips of the other".¹ To provide otherwise "would run counter to interests so sacred and a policy so clear, that public sentiment would not tolerate their sacrifice".² The foundation of this rhetoric is nothing more than the fear of perjury. As the West Virginia court put it, "The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject . . . would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous. . . ." ³

Commentators and judges have repeatedly pointed out the fallacies involved in such assertions and assumptions. The fear of perjury was the basis for the discarded rule disqualifying all interested persons; but experience and reason compelled the conclusion that the fear was exaggerated and the remedy, even if effective, worse than the disease. Besides, it was not effective, for usually persons without the disqualification but having equal or greater motives for lying could be found to produce the same evidence. There is no doubt that much perjury is committed in our courts, but that it is or would be more frequent in cases against estates of decedents or incompetents than in other classes of litigation is a gratuitous assumption. Given a litigant willing to perjure himself and a lawyer willing to present perjured testimony, no exclusionary rule of evidence will operate to prevent it. That litigant and that

1. *Louis v. Easton*, 50 Ala. 470, 471 (1873).

2. *Karns v. Tanner*, 66 Pa. 297, 304 (1870).

3. *Owens v. Owens*, 14 W. Va. 88, 95 (1878).

lawyer will be willing to suborn perjury, and it will be scarcely less difficult to find complaisant witnesses than it was anciently to find professional compurgators. In actions for services rendered against the estates of decedents, relatives of the claimant are rarely unavailable to a plaintiff bent on recovery.

Moreover it seems often to be taken for granted that to admit the testimony is to give it almost conclusive effect whereas in fact it is almost invariably received with suspicion by judge and jury. The opponent too, always may test it by cross-examination and urge the likelihood of its fabrication; frequently he is able to oppose it by circumstantial evidence. With equal disregard for experience it is almost always assumed that rejection of the interested testimony is the only remedy. The alternative of making admissible self-serving declarations of the decedent or incompetent is generally not considered, although enlightening data regarding the alternative are available. In 1927 The Commonwealth Fund published a report of its Committee, which had made an investigation of the operation of statutes dealing with testimony by interested survivors. The following excerpt therefrom is pertinent:⁴

"The ordinary statute has proved to be extremely cumbersome and difficult of application. For example, the Alabama statute had, up to 1914, been before the Supreme Court in one hundred and forty-eight cases; the Iowa statute, up to 1912, in ninety-four cases; the Maryland statute, up to 1910, in ninety-one cases; the Minnesota statute, up to 1917, in one hundred and thirty-two cases; and the North Carolina statute, up to 1919, in two hundred and twenty-one cases. Any statute which requires from ninety-one to two hundred and twenty-one pronouncements of the court of last resort to enable the bar to know what it means must be a curse to litigants and lawyers alike. And what shall be said of the New York statute? Up to 1921, it had been before the appellate courts no less than three hundred and twenty-four times; and still some of its phrases are of doubtful meaning. Mr. J. B. Greenfield of the New York bar has written a text-book of some four hundred pages of which three hundred and seventy-seven are devoted to the judicial interpretation of this statute, which covers less than fourteen lines of print. Very few, if any, of the members of the New York City bar have more experience with this section as applied to will cases than Mr. Henry W. Taft. He says:

'By section 829 it is sought to guard against the danger, sometimes very real, of dishonest claims asserted against decedents' estates, by excluding communications made by a decedent to an interested person. This restriction not

4. Morgan, Chaffee, Jr., Gifford, Hinton, Hough, Johnston, Sunderland, Wigmore, *THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM* (1927) 27.

infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party; and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness.'

"Several states have experimented with more liberal statutes with apparent success. In New Hampshire the interested survivor is permitted to testify to transactions with decedent, 'when it clearly appears to the court that injustice may be done without the testimony of the party.' In Arizona he may so testify 'if required by the court.' In New Mexico, Oregon, and Virginia, he may give such evidence but no verdict or judgment can be based upon his uncorroborated testimony, and in the latter two states certain self-serving statements of the decedent are admissible. In Connecticut, Massachusetts, and Rhode Island he is entirely competent, and declarations of the decedent are also admissible. . . .

"Experience in each of these eight states, excepting only New Hampshire, has shown that these more liberal and simpler statutes have the great practical advantage of being easily comprehended and administered. Do they secure this advantage at the expense of justice, or do they aid in the ascertainment of truth? The observations of lawyers and judges, who have seen the rights of clients and litigants adjudicated under them, should throw much light upon these questions. Connecticut has the simplest statutes and has had the longest experience with them. A questionnaire was submitted to members of the bar and bench of Connecticut with special reference to the provisions authorizing the receipt in evidence of declarations of decedents. Two hundred and eighty-eight answers were received, of which eighty-eight recorded no experience.

"The practical importance of this character of evidence in actual litigation is shown by the fact that sixty lawyers reported one or more cases where these declarations were the exclusive evidence in support or in contradiction of the claim, and ninety-three reported one or more cases where they were the most important evidence.

"Of twenty-one lawyers without experience, twenty thought greater safeguards necessary. Of one hundred and fifty-two lawyers having experience, sixty per cent were satisfied with the statutes as they are. The Justices of the Supreme Court were unanimously of this opinion, and eighty-one per cent of the Superior Court Judges agreed. Of the four Common Pleas Judges, three believed additional safeguards advisable. Outside of these, the only class of lawyers opposed to these provisions were those who had little or no experience with them. And those of experience who suggested amendment usually advised only the requirement of preliminary findings by the judge or the requirement of corroboration.

"Whether the provisions need amendment or not, they are decidedly to be desired if they aid in the ascertainment of truth rather than tend to encourage fraud and perjury. Upon the application of this drastic test all of the judges of the Supreme and Superior Courts found them good; only one judge of the Common Pleas Court dissented, while one other was in doubt. Therefore, out of nineteen judges of the higher courts, seventeen, or over eighty-nine per cent, believed that these provisions aid in the ascertainment of truth. Of all lawyers and judges having any experience, seventy per cent regarded them as beneficent while only thirteen and five-tenths per cent considered them harmful. Of those having experience in more than five cases, eighty-four and five-tenths per cent thought them a positive help in the correct solution of litigated issues; and only in the group having no experience at all was the majority opinion to the contrary. In a word the opposition to these statutes is in inverse ratio to experience with them." ⁵

5. Two members of the Supreme Court of Connecticut express the following opinion:

(1) "I have frequently heard the existing law of Connecticut severely criticized as regards the statutes quoted at the head of the questionnaire. Such criticisms as I have heard have always gone to the text of the provisions as suggesting dire possibilities of fraud arising from trumped up claims against the estate of one who is no longer alive to speak for himself. Such possibilities do, of course, exist, and cases are not wanting where injustice has been perpetrated. Yet I think more injustice would follow the lack of provisions similar to those which we now have.

"I think the criticisms of our present provisions are rather academic. They work quite well in practice. The cases where a claimant comes into court with a bare recital of a promise by a decedent unsupported by other witnesses or weighty confirmatory circumstances are rare, and not likely ordinarily to succeed in gaining a recovery. Presumably a judge has some experience and ability in handling disputed issues of fact, and also counsel may be credited with the ordinary skill of the profession. If so, the trumped up case will almost certainly fail." *Id.* at 32.

(2) "From my experience as lawyer and judge I think the statute is right in theory and on the whole promotes justice. It is for the benefit of the defendant as well as of the plaintiff. Like any other rule of evidence it may aid a fraudulent claim. But I think it is a step in the right direction and does more good than harm." *Ibid.*

Lawyers experienced at the bar and on the trial bench made these statements:

(1) "I have had a good deal of experience with the statutes referred to,—Sections 5735 and 5736, CONN. GEN. STAT. (1918), not only during the term of my office as Judge of the Probate Court for the District of New Haven for ten years, but as a practicing lawyer for over forty years at the New Haven County Bar. The statute was formerly called 'a statute to encourage perjury', a misnomer in my opinion. Not only as a Judge of the Court, but in my practice, I have found the

It is therefore believed that the time has come to abolish all incompetencies of witnesses, and to allow the trier of fact to hear and weigh relevant testimony from any person capable of expressing himself so as to be understood by the judge and jury either directly or through an interpreter.

PRIVILEGES AND PRIVILEGED COMMUNICATIONS

If a party is entitled to present as a witness any person having communicable relevant information, should any such person have a privilege not to testify at all, or not to testify concerning specified matters? Or should a party have a privilege to prevent him from testifying to such matters? If these questions are to be answered in the affirmative, it will be not because there is any danger that the testimony will be untrustworthy or be incapable of valuation by the trier, but rather because of a legislative or judicial conviction that the benefit to a social interest accruing from the suppression of such evidence outweighs the harm done thereby in the investigation of particular disputes.

Too often such a legislative or judicial conviction seems to be based on inadequate data or on sentiment rather than on fact. For example, judicial opinion long asserted that to permit a husband or wife to testify for or against one another would be to destroy marital

statutes very beneficial, and in a large majority of cases a real benefit. Personally I have never known a case where they have been abused. I should dislike very much to see the statutes changed in any way, except as indicated in my answers to your questions."

(2) "I cannot tell in how many cases I have had testimony introduced under this statute, but in a good many, both in cases in which I was counsel and when I was holding trial court. I know of no case in which such testimony opened the door to fraud or perjury any more than it is opened by every class of testimony; and personally I consider this statute a wise and beneficial one and think that the general tendency represented thereby is to be encouraged rather than restrained." *Id.* at 33.

Other active practitioners gave this testimony:

(1) "I have had numerous cases, in fact so many that I could not state the number, and I have been on both sides, that is to say, for and against the estate of deceased persons, and it has been my experience that the statute in question has aided and secured justice. I would not favor any change." *Id.* at 34.

(2) "I have known of numerous cases of serious injustice in the state of New York where the rule is the reverse of the Connecticut rule. I do not recall any case where I thought fraud was perpetrated or injustice done and I think if I had had any such experience, I should remember it because, owing to unfortunate experiences in the State of New York and knowledge of many other instances in cases in which I was not engaged, I have entertained the opinion that the Connecticut rule was eminently superior, and if I had ever known of a case where the Connecticut rule worked badly I think I should have remembered it.

"My experience is that litigation does not follow in Connecticut situations of this sort because the statements and memoranda of the deceased settle the question and satisfy everybody concerned as to what the facts are. My experience is that if any possible injustice has been wrought it has been favorable to the estate of the deceased rather than to the contrary. The general tendency of everybody concerned is to pay a very high respect to memoranda of the deceased and this has prevailed sometimes when the opposing party contradicted it.

"I do not think the law should be changed." *Ibid.*

harmony. Experience under statutes, some of which make spouses competent but not compellable witnesses against each other, and others of which make them both competent and compellable, has exploded this idea, but it still remains the foundation of the rule privileging confidential communications between husband and wife. Likewise the theory that public health is promoted by statutes making communications between physician and patient privileged rests solely on *a priori* grounds. No statistics as to health in states where no such privilege exists, as compared with those in states where it is recognized, can be tortured into a support for it; but the law reports, and the experience of judges and lawyers furnish ample evidence that such a privilege operates to suppress the truth and to further injustice. Consequently, a thoroughgoing reformation of the law of evidence would begin with the abolition of all privileges, and then recreate only such of them as reason and experience justify.

The privilege of an accused in a criminal action to refrain from testifying and the privilege against self-incrimination are in a class by themselves. They are so thoroughly imbedded in the Anglo-American system that even to question their fundamental validity seems futile, particularly in this day when every safeguard to personal liberty should be strengthened. And yet if we assume the continuance of a public trial before a judge and jury, with the accused represented by competent counsel, it is difficult to find any reason why he should not be required to take the stand and be treated like a witness or party in a civil action. And why should a witness or party in open court be privileged to refuse to give incriminating answers? However much he may need protection from abuse by police and prosecutors, he hardly needs protection from abuse by judge and jury. And it is arguable that at least some of the evils of the so-called third degree are due to the realization by police and prosecutors that the accused cannot be required to talk in open court. A theoretical code of evidence would make an accused compellable as well as competent as a witness and would recognize no privilege to refuse to give incriminating answers in open court. It would not attempt to regulate the conduct of police and prosecutors by the feeble device of an exclusionary rule of evidence which is one of the causes of the disease it seeks to cure. It would leave that to a more direct and effective agency of government. The theoretical code would assume the continuance of a system which furnishes a competent judge, an impartial jury in all criminal trials, opportunity to be represented by counsel, and a public trial. The experience of the past and the threats of the present may make such an assumption questionable, and require a legislator to temper his theory with caution. Perhaps the

most that should be sought is an enactment which will preserve these privileges but will permit the judge in his discretion to comment upon and to allow counsel to comment upon, and the trier of fact to draw all reasonable inferences from, an exercise of either privilege.

The privilege which covers confidential communications between client and attorney originally belonged to the attorney. He could not be compelled to violate his obligation as a gentleman to keep such a communication secret, but the courts were not so tender with the client; he must disclose. Now the client alone has the privilege; he need not disclose and can require the attorney to do so. And as usually happens, a new rationalization is provided for an old rule which has lost the original reason for its being. We are told that the relationship between attorney and client is one to be fostered if justice is to be efficiently administered, that full disclosure by client to attorney is essential to the relationship and the proper execution of the attorney's duties to the court and to the client, and that secrecy of communication is essential to that confidence. It requires no argument to convince one acquainted with our present system of pleading, evidence and trial and with our complex and confusing statutes, that lawyers perform a necessary function in our society, or that full disclosure is essential to a proper execution of the attorney's duties to the client. Such disclosure may also be requisite to an adequate performance of his duty to the court, but this is true only because the client also owes such a duty, if disputes between litigants are to be honestly settled by the courts. But why is secrecy of communication essential? Who will lose by the client's consciously withholding part of the facts? What will his opponent lose? Nothing more than he will lose if the facts are disclosed to the lawyer but hidden from the court. What will the court lose? Its decision can be based only on the facts disclosed, and it can no more act on facts disclosed to the attorney but kept from its consideration by operation of the privilege than on facts hidden in the breast of the litigant. The only person who can lose is the client himself; and if he chooses to suppress a part of the truth, why should any provision be made to save him from the cost of suppression? The simple truth is that this plausible rationalization will not bear analysis. Its first two postulates are persuasive, but they cannot conceal the error in its third.

Practical considerations in the trial of a lawsuit do require a limited privilege. So incongruous are the roles of advocate and witness that the courts discourage attorneys conducting an action from testifying for their clients, and canons of ethics denounce such a practice. Furthermore, the courts have said that a trial attorney should be called against his client only when the same evidence cannot be secured from

other sources. There is some reason, then, why an attorney should be privileged from testifying against a client in a trial in which he is appearing as counsel; but even such a privilege should be carefully limited.

A scientific code of evidence would, therefore, erect no privilege for communications between client and attorney, and would contain only some reasonable restrictions upon the right of a litigant to call an attorney conducting a trial to testify against his client therein. But there is no hope of securing the adoption of such a provision. It would require almost untold effort to induce the bar even to give a proposal for its adoption serious consideration; those laymen who are not present or prospective litigants have little or no interest in the subject; those laymen who are frequently actual and always potential litigants find the privilege too often a convenience, to be fired with a desire to destroy it.

It cannot be said that the common law recognized any privilege for communications between penitent and priest, although cases are almost unknown wherein a priest was actually compelled to disclose confidences of the confessional. Such communications are rarely relevant save in criminal prosecutions and actions for divorce. Even in them counsel will not usually insist upon a disclosure, for the prejudice which would result to his cause by a forced violation of a religious obligation would heavily outweigh the value of the testimony. Consequently it is not of great moment whether such a privilege be formally recognized or denied.

The sentiment supporting the privilege for communications between husband and wife is almost as strong as that behind the priest-penitent privilege. The cases in which it is applied are numerous, and the results are serious for the opposing litigants. Although it can be argued that the common law knew no such privilege, still the common law rule preventing spouses from testifying for or against each other served much the same purpose. While no weighty argument, based on reason or factual data as opposed to sentiment, has been advanced to justify retention of the privilege, it is more than doubtful whether a proposal to abolish it would receive any substantial support. By making the privilege inapplicable to actions between spouses, to criminal prosecutions of a spouse for injury done to the other or the other's property or to the children of either, and to communications made to enable either to commit or plan to commit a tort or a crime, much of the harm which would otherwise be done by it would be eliminated. The necessity for making such exceptions is, of course, a strong indication of the advisability of destroying the entire privilege.

No doubt information not open or officially disclosed to the public regarding the military or naval organization or plans of the Government or concerning international relations ought not to be disclosed in a public trial between litigants. Testimony revealing it should be inadmissible, and it should be the duty of the judge rather than a privilege of the witness or the right of the opposing party to see that it is excluded. The same is true as to information contained in official communications, disclosure of which would be harmful to the Government. A comprehensive code would make provision accordingly.

EVIDENCE OF COMPARATIVELY LITTLE PROBATIVE VALUE

The primary postulate of a scientific investigation that all relevant evidence is to be secured and considered is inapplicable to litigation without some modification. A lawsuit is a proceeding primarily for the settlement of a dispute between litigants rather than for the discovery of truth. Its machinery is ill-suited for thorough, impartial investigation and meticulously accurate conclusions. It is the function of the adversaries to define the issue and to produce the evidence. Speed of determination is sometimes even more important than accuracy. Indefinite postponement of decision is impossible. The primary postulate in litigation should be that all relevant evidence is admissible. This should be modified only for very cogent reasons. Such reasons are found where disadvantages involved in the reception of evidence of comparatively little probative value may outweigh the benefits which its consideration would contribute to the solution of the issue. It may be that the evidence if received would create an illegitimate prejudice out of all proportion to its legitimate probative value. Or its reception, involving also the admission of evidence in opposition, may call for undue consumption of time; or the tender of the evidence may unfairly surprise the opponent; or the contentions raised by the evidence may confuse the issues on which the decision should depend.

Whether these disadvantages or serious dangers from them exist in any case to such extent as to require the rejection of the evidence is a question for the trial judge. In reaching his decision he must consider not only whether the offered evidence has any relevance to any matter provable in the action but also how much weight it can properly be given by the trier. To attempt to prescribe measurements of logical value for him would be not only unwise but futile. Our law reports are already overcrowded with decisions illustrating this un wisdom and futility. They deal with almost every item of human behavior and experience, but in net result they accomplish little or nothing save where they result in rules of thumb. Certainly no code should crystallize decisions upon particular states of fact into hard and fast rules, for only

in rare instances will exactly the same states of fact recur and rarely will the circumstances of the trial in which evidence of them is offered be precisely alike. No record of the proceedings can reproduce the situation at the trial with fidelity. Consequently the ruling of the trial judge should be final except in the most unusual cases where his action appears to be arbitrary or capricious.

The division of the code dealing with the exclusion of relevant evidence should, it is suggested, begin with a provision that the judge may in his discretion exclude otherwise admissible evidence if he finds that its probative value is outweighed by the risks that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice or confusion of issues or unfairly surprise the adverse party, and that decisions applying this provision shall not be precedents in later cases involving similar facts.

EXPERT AND OPINION EVIDENCE

No one acquainted with the reported decisions in this country dealing with opinion evidence by lay witnesses and experts, and with the operation of the applicable law in practice will deny that the entire subject needs reconsideration. The rules which have been evolved by our courts prohibiting a witness from describing his relevant personal experiences in terms of inferences or conclusions are so artificial and difficult of application as to furnish occasion for numerous unmeritorious appeals and for many puzzling reversals. Happily there appears in the more recent opinions a tendency to encourage the trial judge to allow witnesses to tell their stories in ordinary language and a tendency to refuse to interfere with his rulings. Most of the decisions, however, speaking generally, seem to require the rejection of all opinion, lay and expert, upon issues which are to be ultimately decided by the jury, on the untenable ground, that to permit the jury to hear the opinion of the witness is to interfere with its function of forming its own opinion. They also exclude lay opinion, and most expert opinion, concerning such qualities of human behavior as care, safety, propriety, reasonableness and their opposites, partly for the same reason and partly on the theory that the elements of the behavior from which the conclusion as to its quality is drawn can be adequately otherwise described to the trier. Evidence of opinion as to skill or competence falls in the same class. On the other hand a witness may state his opinion as to time, speed, distance, direction, size, weight, form, identity and some similar matters if what the court regards as a proper showing of qualification has been made. To cap the climax, a witness who has once seen a person write may give his opinion upon the issue whether that person wrote a disputed document.

When a witness is trying to tell about what he has experienced, to attempt to compel him to distinguish between so-called fact and opinion is to invite profitless quibbling. No such distinction is analytically possible. The English common law does not try to prevent a witness from describing what he has perceived in terms which include inferences. If a more accurate impression can be conveyed by detailing the data, the details may be brought out on cross-examination, or the judge may require the witness to state them before or in connection with his conclusions. A code should contain a rule to the effect that a witness in testifying to what he has perceived may give his testimony in terms which include inferences and may state all relevant inferences, whether or not embracing ultimate issues to be decided by the jury, unless the judge finds that it requires expertness to draw the inferences and that the witness has not the requisite qualifications. The judge should, of course, have the discretion to require the witness, before testifying in terms of inference, to state the data upon which the inference is founded.

As early as the fourteenth century, the English judges sought and received the aid of expert witnesses; and ever since that time the common law courts have received testimony of competent experts. No one questions the necessity for expert testimony; but the practices which have grown up around its use have become a scandal. Members of the bench and bar and of other learned professions are demanding reform. The Commissioners on Uniform State Laws and the American Bar Association have given the subject serious consideration.⁶ They are in practical agreement upon an Act, the chief provisions of which are that (1) the court may appoint expert witnesses to testify in an action in which it determines that expert evidence will be of substantial assistance; (2) experts not appointed by the court may be called, but only after notice to the adversary; (3) the court may order submission of persons and things to examination by experts under reasonable conditions, and may order the experts to file written reports of their examinations and the inferences drawn therefrom; (4) the reports of experts are open to inspection by the parties; (5) the reports may be read in evidence by the experts; and (6) an expert may state his inferences from relevant matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special skill or knowledge without first specifying as an hypothesis or otherwise the data from which he draws the inferences. Provision is also made for compensation of experts appointed by the court.

6. (1937) PROC. NAT. CONF. COMM'RS UNIFORM STATE LAWS 339; (1938) 63 A. B. A. REP. 583.

This proposed Act tends to eliminate some of the evils arising from the present system in which expert witnesses are frequently nothing more than expert advocates. It also enables court, counsel and experts to avoid the absurdities which practitioners have, with the consent of the courts, piled upon the hypothetical question. The Act leaves much to be desired, but it goes about as far as the profession can be induced to go at present.

HEARSAY

The hearsay rule, like the rest of the law of Evidence, has been said to be the child of the jury system. As to much of the law of Evidence the entire lack of influence of the jury can be clearly demonstrated; as to the hearsay rule also the statement, unless qualified, will not bear close investigation. It would more nearly approximate the truth to say that the hearsay rule is the child of the adversary system, and that the jury is a foster parent foisted upon it by the judges and text-writers of the nineteenth century. The Anglo-Saxon trial by ordeal, the Anglo-Norman trial by battle, trial by compurgation both before and after the Norman Conquest, were essentially adversary proceedings. Though they were conducted under the supervision of the court, the adversaries furnished the actors through whom they appealed to the Deity for a decision. The institution of the Norman inquest, from which the jury evolved, was revolutionary. It not only substituted a rational investigation for a more or less superstitious ceremony, but it removed the proceeding for the determination of the facts completely from the control of the litigants. To use Mr. Thayer's phrase, it made the decision depend upon "what a set of strangers might say, witnesses selected by a public officer".⁷ And these strangers gave their answers without the assistance of the court and without evidentiary help or hindrance from the litigants. The parties were permitted to state their respective contentions. Later they secured the privilege of furnishing additional information to the jury. Of this privilege they took greater and greater advantage, so that by the opening of the 1600's juries ordinarily depended for their information chiefly upon evidence given in open court. And before the middle of the 1700's, jurors were obliged to rely only upon what was thus presented in determining the facts of the particular case. This evidence was furnished almost, if not quite, exclusively by the parties. The purely investigative system of the Norman inquest had become our modern adversary system.

7. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 56.

During the first few centuries of the jury system, the jury based its decision upon what the jurors themselves knew of the matter in dispute and what they learned "through the words of their fathers and through such words of persons whom they are bound to trust as worthy".⁸ Until the end of the sixteenth century hearsay was received without question. Some objections were made shortly before the opening of the 1600's, but these had to do with weight rather than admissibility. By the middle of that century they grew in number and strength, so that by the beginning of the 1700's hearsay was excluded except when offered in corroboration of non-hearsay. By the end of the third decade of the eighteenth century, it was generally rejected. The earliest reason for rejection was lack of oath. As Chief Baron Gilbert put it: "Besides . . . the person who spake it was not upon oath; and if a man had been in court and said the same thing and had not sworn it, he had not been believed in a court of justice".⁹ While the jurors were regarded principally as witnesses rather than as finders of fact, their oaths sufficed to give the requisite religious sanction common to all other forms of solemn investigation. When it was perceived that the author of the hearsay statement was the real witness, and the witness on the stand merely a conduit for the conveyance of the author's testimony, it was to be expected that the lack of oath would be urged and accepted as a ground for excluding the statement. However much it may be regretted, the sanction of the oath has lost most of its effectiveness. If lack of oath alone were the basis for the rejection of hearsay, it could not suffice to excuse the exclusion of any helpful evidence. Nor does the presence or absence of a jury in any wise affect the necessity for the oath. As early as 1668, sworn hearsay was excluded, because "the other party could not cross-examine the party sworn, which is the common course", and in 1696 sworn depositions were rejected for the same reason.¹⁰ Nothing is said about the jury or about its supposed credulity. Cross-examination is not required, but opportunity for cross-examination. The adversary not the jury is to be protected.

As our system changed in character from investigative to adversary, the rule rejecting hearsay and the rule making opportunity for cross-examination a requisite of admissibility developed side by side. This was no mere historical accident. The civil law, like the common law, requires witnesses to speak under oath with its accom-

8. BRUNNER, *THE ORIGIN OF JURY COURTS* (1872) 427, 452, as quoted in 5 WIGMORE, *EVIDENCE* (3d ed. 1940) § 1364.

9. GILBERT, *EVIDENCE* (2d ed. 1760, written before 1726) 152.

10. Anonymous, *Roll. Abr.*, 2, 679, pl. 9, as quoted in 5 WIGMORE, *EVIDENCE* § 1364, n. 51.

panying sanctions. It requires confrontation in some cases; but it remains an inquisitorial rather than an adversary system. It does not know anything like the Anglo-American cross-examination. Bentham says: "The peculiarity of the practice called in England cross-examination,—the complete absence of it in every system of procedure grounded on the Roman, with the single exception of the partial and narrow use made of it in the case of confrontation,—is a fact unnoticed till now in any printed book, but which will be as conclusively as concisely ascertained at any time, by the impossibility of finding a word to render it by, in any other language".¹¹ And the civil law does not reject hearsay. To be sure, it has no jury; but the opportunity for cross-examination is not a necessary element of a jury system, while it is the very heart of an adversary theory of litigation.

Consequently, not the jury system but rather the adversary theory of litigation, coupled with then accepted notions as to the value of an oath account for the hearsay rule as it was at the opening of the nineteenth century.

At that time the proponent of hearsay had the burden of producing precedents to warrant its admissibility. This he could do for dying declarations, pedigree statements and entries in a parson's books, in account books of stewards and in certain other writings. But a strict construction of the precedents resulted in the creation of some artificial limitations even upon these exceptions. As the judges began their attempts to rationalize the results of the decisions dealing with evidence, they first relied upon the general notion that a party was obliged to produce the best evidence available, but no more. Had they applied this generally, hearsay would have been received whenever better evidence could not be obtained. Therefore, the judges discovered a special sort of necessity in these exceptional cases, and found in addition some circumstance which was thought to make the admissible hearsay less unreliable than hearsay in general. By the fourth decade of the 1800's, it became the fashion to attribute the exclusion of hearsay to the incapacity of the jury to evaluate it, and in the development of exceptions to the rule, courts have doubtless been influenced by this notion. Modern text-writers and judges have purported to find for each exception some sort of necessity for resort to hearsay and some condition attending the making of the excepted statement which will enable the jury to put a fair value upon it and will thus serve as a substitute for cross-examination. A careful examination of the eighteen or nineteen classes of utterances, each of which is now recognized as

11. 2 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (Mill's ed. 1827) 433-434.

an exception to the hearsay rule by some respectable authority, will reveal that in many of them the necessity resolves itself into mere convenience and the substitute for cross-examination is imperceptible. The fact is that no one theory will harmonize the decisions. The reception of admissions can be explained only upon the adversary theory of litigation. A hearsay statement of a party to the action is received against him although he is incompetent as a witness and has no personal knowledge of the matter stated, and the statement when made was highly self-serving. On the other hand, relevant former testimony of a witness, given under oath and fully cross-examined, is rejected when offered against a party who had no opportunity to cross-examine the witness. Moreover, by the so-called orthodox view, it is excluded even when offered against such a party, if it would not have been receivable against the proponent. Only an extreme application of the adversary theory can account for this. In most of the exceptions, however, the adversary theory is disregarded. There is nothing in any of the situations to warrant depriving the adversary of an opportunity to cross-examine; but those rationalizing the results purport to find some substitute for cross-examination. In most instances one will look in vain for anything more than a situation in which an ordinary man making such a statement would positively desire to tell the truth; and in some the most that can be claimed is the absence of a motive to falsify. Once in a while a court will frankly put the case for reception upon the ground that all available evidence is necessary and that hearsay is better than nothing.

If the courts were really convinced that uncross-examined evidence is too unreliable to be considered, they would be compelled to determine what elements of weakness cross-examination is designed to uncover, and how many of those elements need be present in any case or class of cases in order to condemn it. No doubt properly conducted examination will test all qualities of the perception, memory, narration and veracity of the witness. Experience on the bench and at the bar makes it abundantly clear that the chief value of cross-examination is to disclose defects relating to perception or memory; occasionally it reveals misleading qualities in narration, and rather infrequently exposes intentional falsehood. Consequently any evidence which requires the jury to rely upon the perception, memory, narration or veracity of a person who is not under oath and subject to cross-examination has some of the dangers of hearsay; and evidence which requires reliance upon his perception and memory, even though his narration and veracity be guaranteed, contains the greater of these dangers. Yet much evidence of non-assertive conduct requir-

ing such reliance is never questioned on the ground of hearsay; and the leading writer on the subject in effect defines hearsay as an extrajudicial statement offered to prove the truth of the matter asserted in it.¹²

The fact is, then, that the law governing hearsay today is a conglomeration of inconsistencies, developed as a result of conflicting theories. Refinements and qualifications within the exceptions only add to its irrationality. The courts by multiplying exceptions reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation by a jury as well as by other triers of fact. Almost every statute regulating procedure before administrative tribunals makes hearsay admissible. And it is a mere blinking of facts to pretend that the administrative official ordinarily presiding at a hearing has more competence to value testimony than has a jury acting under the supervision of a judge. The number of cases tried before juries as compared with the number tried before judges without juries and before administrative tribunals is small indeed. The time is ripe for radical liberalization of the common law rule.

That liberalization should begin by confining hearsay by definition to conduct intended to operate as an assertion, evidence of which is offered to prove the truth of the matter asserted therein. It would then provide that evidence of hearsay should be admitted if the court finds that the person making the hearsay assertion is unavailable as a witness, or if the court finds that he is available and that before the close of the trial or hearing he will be produced by the proponent for cross-examination on demand of the adversary. The court should have discretion to reject the evidence in the latter situation if it finds that the adversary has good reason for desiring to cross-examine the asserter and that the rejection will not interfere with an orderly and effective presentation of the proponent's case. Additional rules governing the admissibility of admissions, personal, adoptive and vicarious, of official statements and records, of judgments, of commercial lists and the like, of learned treatises, and of reputation should be drafted in plain and simple terms. A provision admitting books and entries made in the regular course of business, embodying the most liberal provisions of current applicable statutes, would complete the chapter.

These proposals call for greater liberalization than is found in any current legislation governing the admissibility of evidence in the courts, but do not go beyond present administrative practice.

12. 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1361.

AUTHENTICATION AND CONTENT OF WRITINGS

The common law rules governing this subject are not difficult, but they can be simplified. Concerning proof of authentication of ordinary writings, no unusual requirement as to quantity or quality of evidence is necessary. Where, however, the writing is of such age as to make it likely that percipient witnesses capable of giving satisfactory evidence of genuineness will be unavailable, the common law rule in simplified form should be stated. It should be provided that the question of authentication is for the trier of fact after evidence has been introduced from which the judge finds that the writing is at least a given number of years old, is in such condition as to create no suspicion concerning its authenticity, and at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found.

Special simplified provisions like those contained in Rule 44 of the Federal Rules of Civil Procedure should be made for evidence of official records.¹³ As for proof of content of other writings, the principle at the base of the so-called best evidence rule should be stated. Evidence other than the writing itself should be received if the judge finds that the original is now unavailable for some reason other than the neglect or wrong-doing of the proponent of the evidence, or that it would be unfair or inexpedient to require the proponent to produce the writing. One other situation must be cared for. If the dispute as to the availability of the original turns on whether a writing produced by the opponent of the secondary evidence is the original, the trial judge must answer that question in order to rule on the admissibility of the evidence. If he decides against the opponent, he will admit it. If he decides against the proponent, he will exclude it; but if the writing thus found to be the original is introduced in evidence, the rule is satisfied. Thereafter proponent's secondary evidence is admissible as tending to show that the writing so introduced has been altered or that the content of the genuine original was entirely different. The code should therefore provide that evidence other than the writing should be received after a writing found by the court to be the original has been introduced.

Such provisions would be easy to apply and would accomplish every legitimate purpose of the common law rule.

PRESUMPTIONS

Limits of space prevent an exposition of the intolerable condition of the existing law governing presumptions. That has been done else-

13. 48 STAT. 1064 (1934), 28 U. S. C. A. § 723c (Supp. 1939).

where almost *ad nauseam*. What is needed is a simple, legislative solution. No very simple solution will be completely rational. A rational solution has been attempted by the Supreme Court of Connecticut,¹⁴ which has declared that the effect of a presumption should depend upon the reasons which caused the courts or legislature to create it. To attempt to classify the myriads of existing presumptions or to assign to each a given effect would be hazardous or hopeless. One of the simplest proposals is to adopt the Thayer theory, recognized by the United States Supreme Court,¹⁵ which makes the presumption vanish whenever evidence has been introduced which would justify a finding of the non-existence of the presumed fact. This cannot be rationally justified for presumptions created for any reason other than to require a litigant to demonstrate that he has evidence sufficient to raise an issue for the jury or other trier of fact. Another easily understood and easily applied solution is found in Pennsylvania where the normal effect of a presumption is to put the burden of persuasion upon the party asserting the non-existence of the presumed fact.¹⁶ This runs counter to the generally accepted but logically indefensible dogma that the burden of persuasion never shifts. A possible compromise is to apply the Thayer theory where the basic fact upon which the presumption rests has no probative value as evidence of the presumed fact; to use the Pennsylvania doctrine where the basic fact has sufficient probative value as evidence of the presumed fact to support a finding of the presumed fact; and to provide that where the basic fact has some probative value as evidence of the presumed fact but not sufficient value to support a finding, the question of the existence or non-existence of the presumed fact shall be for the trier of fact unless evidence has been introduced sufficient to compel a finding. The compromise has the merit of giving a substantial procedural effect to every presumption. The question for the trial judge is one which he constantly has to answer, and can answer without undue difficulty, namely what, if any, probative value has the basic fact of the presumption.

GENERAL PROVISIONS

Any code of rules governing evidence can be made cumbersome and impracticable by an unsympathetic attitude in applying it and by insistence upon enforcing its letter. Consequently provision should be made to discourage obstructive tactics by counsel, to prevent appeals

14. *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934).

15. *New York Life Ins. Co. v. Gamer*, 303 U. S. 161 (1937), 114 A. L. R. 1218, (1938) 5 U. OF CHI. L. REV. 685.

16. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 60.

and reversals for immaterial variations from the rules, and to give the judge effective control over the trial. Rules similar to those tentatively approved by the American Law Institute at its annual meeting in 1940 would tend to accomplish the desired purposes:

(1) If the judge finds that there is no bona fide dispute between the parties to the action as to any matter, no rule restricting the admissibility of relevant evidence, except evidence subject to exclusion by reason of privilege, shall be enforced as to evidence concerning that matter, even though it is in issue under the pleadings.

(2) A verdict or finding shall not be set aside or the judgment based thereon be reversed by reason of the erroneous admission or exclusion of evidence relevant to a matter if the court which is to determine the effect of the error finds from concessions of counsel or any part of the record in the case that there was no bona fide dispute between the parties as to the matter and the verdict or finding is consistent therewith.

(3) A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless

- (a) there appears of record objection to the evidence timely interposed and so stated as to make clear to the judge and the adverse party the specific ground of objection, and
- (b) the court which is to determine the effect of the error or errors is of opinion that the erroneously admitted evidence probably had substantial influence in producing the verdict or finding.

(4) A verdict or finding shall not be set aside nor shall the judgment or decision based thereon be reversed on account of the erroneous exclusion of evidence unless

- (a) it appears of record that the proponent of the evidence either made known to the judge and the adversary the substance of the offered evidence in a form and by a method approved by the judge, or indicated the substance of the desired evidence by suggestive questions properly put under rules governing the use of leading questions, and
- (b) the court which is to determine the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in producing a different verdict or finding.

(5) After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses.

The foregoing suggestions are submitted without attempting to draft specific provisions or to present full argument in support of them. It would be optimistic to hope that many members of the bench and bar would, of their own motion, devote much time to an investigation and consideration of their merits and demerits even in normal times; to expect them to do so today would be fatuous. Perhaps in more propitious times these suggestions may profitably be renewed.